No. 76-70

In the Supreme Court of the United States

OCTOBER TERM, 1976

EDWARD LLOYD STREET, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
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Washington, D.C. 20530.

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Petitioner contends that the district court abused its discretion by admitting evidence of his poor character and prior bad acts.

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted on two counts of transporting a forged check in interstate commerce, in violation of 18 U.S.C. 2314 and 2, and of conspiracy to commit that offense, in violation of 18 U.S.C. 371.[1] He was sentenced to 18 months' imprisonment. The court of appeals affirmed in an unpublished opinion (Pet. App. A).

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[1]Co-defendants Carl Thomas Bannon, Jr., Jerome Fleet Cowden, Richard Kilcullen, and Francis Ashby Reddall, Jr., were tried separately and convicted on similar charges.

The evidence at trial is set forth in detail in the opinion of the court of appeals. It showed that petitioner and co-defendant Kilcullen travelled from Massachusetts to New York on December 3, 1973, to open a bank account at the Bankers Trust Company in the name of the Island and Overseas Bank, Ltd. (IOB) of Tortola, British Virgin Islands. Petitioner represented to bank manager George Littlejohn that he was president of IOB, that the company had some one million dollars in paid-in capital, and that the company's account would remain inactive. In fact, IOB was a corporate "shell" which petitioner had purchased from a Miami lawyer named Saul Cooper in January 1973 (Pet. App. 10). Cooper testified about the details of the sale, including the fact that petitioner had defaulted on the promissory purchase notes in January and April 1973 and that he (Cooper) had thereafter rescinded the sale and had notified the Registrar of Companies in Tortola that the sale had been annulled.[2]

Petitioner returned to Bankers Trust on December 10, 1973, and deposited two $97,000 checks purportedly drawn on the Watertown, Massachusetts account of a Charles Brennick, payable to and apparently endorsed by a Jacob Weiner. Each of these checks had been forged, with Brennick's signature having been traced onto the checks from a specimen of his genuine signature. (Pet. App. 11, 13).[3] After these checks had been cleared by Bankers

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[2]Cooper related that, in January and February 1973, petitioner had complained that IOB did not have a license that was required of all banks under a new Tortolan bank law. Cooper had agreed to exchange IOB for a corporate banking shell in another Carribean sovereignty, but petitioner never responded to this offer and instead proceeded to default on the IOB purchase (Pet. 5).

[3]Brennick was a Massachusetts businessman who, upon incurring financial difficulties, had recently secured a $1.4 million loan. The proceeds of this loan were credited to his account on December 10, 1973, the same day that the Weiner checks were dated. Only a few persons, including Brennick's bookkeeper, co-defendant Reddall, had known that the loan would be placed in Brennick's account on that date (Pet. App. 13-14).

Trust, petitioner withdrew $100,000 in cashier's checks and deposited them in a newly opened savings account in his own name at the Lincoln Trust Company in Massachusetts. One week later he withdrew $55,000 of this deposit in cash.[4] Petitioner also wrote two more checks, totalling $25,000, on the Bankers Trust account, payable to co-defendant Cowden (Pet. App. 12).

Petitioner contended at trial that he did not know the checks had been falsely made or forged. He claimed that shortly after opening the IOB bank account he had been approached by co-defendant Bannon, a business associate, and had been asked to process two checks and to distribute the proceeds as directed, all for a fee of $10,000. Petitioner alleged that after checking with co-defendant Kilcullen, his lawyer, to determine if the proposal was legal, he met with co-defendants Bannon and Cowden on December 7, 1973, at which time Cowden gave him the two Weiner checks, claiming that Weiner was his client. Petitioner also offered explanations for the several suspicious transactions that occurred after the checks had been deposited (Pet. App. 14-15).

In view of the substantial circumstantial evidence of petitioner's knowing complicity in the fraudulent scheme, the jury rejected his defense. This evidence included

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[4]Lincoln Trust did not allow petitioner to make any withdrawals until the cashier's checks had cleared, in spite of petitioner's false protestations that he had to meet a payroll (Pet. App. 12 and n. 6).

the fact that petitioner had misrepresented the status and assets of IOB to Bankers Trust, had suggested routing the checks in a circuitous fashion through several banks, and had agreed to a fee of $10,000 for performing functions that could easily have been carried out by co-defendants Bannon or Cowden. In addition, while petitioner claimed that he had been promised $10,000 for his services, he had written some $19,000 in personal checks upon the various Bankers Trust and Lincoln Trust accounts. Bank manager Littlejohn testified that it was not customary for a bank executive to utilize for personal expenses an official account such as that purportedly maintained by IOB at Bankers Trust.[5]

Petitioner contends (Pet. 6-7) that the district court abused its discretion by admitting Cooper's testimony concerning petitioner's default in the purchase of IOB and by admitting Littlejohn's testimony concerning New York banking law and the impropriety of a bank officer's use of bank funds to pay his personal debts. Although evidence of a defendant's other crimes or prior bad acts is inadmissible merely to show his bad character, the settled rule is that such evidence may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b), Fed. R. Evid. See, *e.g.*, *Nye & Nissen* v. *United States*, 336 U.S. 613, 618; *Moore* v. *United States*, 150 U.S. 57, 61; McCormick, *Evidence* §190 (2d ed. 1972). The question of admissibility is addressed to the sound discretion of the trial court, which must determine whether the probative

[5]Littlejohn also testified that under New York law a bank was required to obtain a license from banking officials before it could do business in the State.

value of the evidence is outweighed by its prejudicial effect. See *United States* v. *Alejandro*, 527 F. 2d 423, 429 (C.A. 5), certiorari denied *sub nom. Rocha* v. *United States*, No. 75-6432, June 7, 1976; *United States* v. *Chapin*, 515 F. 2d 1274, 1284 (C.A. D.C.), certiorari denied, 423 U.S. 1015.

Here, the prime issue in dispute at trial was whether petitioner was aware that the Weiner checks had been forged or whether, as petitioner claimed, he had not known of the fraud and had been duped into cashing the checks while pursuing what he thought was a legitimate business deal. The challenged evidence was probative of petitioner's actual state of mind, since it showed that he had used a suspicious "shell" corporation to cash and distribute the checks, he had misrepresented himself to Littlejohn in claiming to be president of IOB, and, while purporting to function as a banker in his dealings with Bankers Trust, he had violated basic tenets of banking practice. The evidence was thus clearly relevant to establish that petitioner knew he was not pursuing a legitimate business transaction, and the district court properly admitted it at trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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